NO. 81445-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

SANTIAGO RIVERA-SANTOS, Petitioner

CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-01555-8
CLARK COUNTY DISTRICT COURT CAUSE NO. 612705

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

JOHN E. (JACK) PETERSON, WSBA #38362
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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I. STATEMENT OF THE CASE

The State substantially agrees with the statement of facts set forth by the Defendant. Where additional information or clarification is needed, it will be provided in the argument section of the brief.

II. ISSUE PRESENTED

Under Revised Code of Washington (RCW) 10.43.040, if a defendant drives a motor vehicle while under the influence of alcohol from the State of Washington into the State of Oregon during one continuous trip behind the wheel, does his subsequent Oregon Driving Under the Influence of Intoxicants (DUI) conviction based upon his act of impaired driving in Oregon bar the State of Washington from prosecuting the defendant for DUI for his act of impaired driving in Washington?

III. STANDARD OF REVIEW

Because this appeal is limited to an interpretation of RCW 10.43.040, it is a question of law. As a result, this Court reviews District Court Judge Swanger's ruling *de novo*. State v. Benn, 161 Wn.2d 256, 262, 165 P.3d 1232 (2007) ("This court reviews questions of law de novo.").

IV. ARGUMENT

RCW 10.43.040 applies only when the same act is prosecuted twice. Because the Defendant's conviction for DUI while within the territorial boundaries of the State of Oregon and the State of Washington's charge against him for DUI while within the territorial boundaries of State of Washington arise out of separate acts, RCW 10.43.040 does not prohibit the State from prosecuting the Defendant.

A. BACKGROUND OF RCW 10.43.040

To understand RCW 10.43.040, one must understand the concept of "dual sovereignty." Under this doctrine, neither the Federal Constitution nor the Washington Constitution bars subsequent state prosecution even when the prosecutions are based upon the same act. State v. Caliguri, 99 Wn.2d 501, 511, 664 P.2d 466 (1983); State v. Ivie, 136 Wn.2d 173, 178, 961 P.2d 941, *superseded by amendments to 10.43.040* (1998); Heath v. Alabama, 474 U.S. 82, 88 (1985) ("The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause."); *see also* United States v. Wheeler, 435 U.S. 313, 316-17

(1978); Bartkus v. Illinois, 359 U.S. 121, 137 (1959).[1] The doctrine is "based on the independent interests which both the federal and state sovereigns have in our federal system." Caliguri, 99 Wn.2d at 511.

The State of Washington, however, has provided greater double jeopardy protection through RCW 10.43.040 which reads as follows:

> "Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, in a judicial proceeding conducted under the criminal laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense. Nothing in this section affects or prevents a prosecution in a court of this state of any person who has received administrative or nonjudicial punishment, civilian or military, in another state or country based upon the same act or omission."

This statute's plain language prohibits the State from prosecuting a defendant for the same act when that act has been previously adjudicated on the merits by another state or country. As a result, it abrogates dual sovereignty. Caliguri, 99 Wn.2d at 511.

It is not surprising then that Washington courts apply RCW 10.43.040's statutory double jeopardy protection to cases where dual sovereignty would inhibit constitutional double jeopardy protection. RCW 10.43.040 was construed "to prohibit state prosecution for any offense

[1] Judge Swanger made it clear that his ruling was based upon RCW 10.43.040 and neither the Federal nor Washington Constitutions. RP 23-24.

which is *in fact alone* identical to or included within an offense for which a defendant has been previously prosecuted in another jurisdiction." *Id.* at 514 (emphasis added).

As laid out by this Court in Caliguri, RCW 10.43.040 prohibits prosecution when one of the following two situations presents itself. First, it applies when the acts to be proved in a prosecution in the State of Washington are *identical* to acts already adjudicated on the merits by a foreign jurisdiction (another state, country, or the federal government). This would be the classic dual sovereignty case where exactly the same conduct is prosecuted twice by different jurisdictions. For example, in Ivie, the defendant was convicted and punished by a military tribunal for DUI.[2] 136 Wn.2d at 175. After being punished by the military tribunal, he faced a DUI charge brought by Kitsap County for exactly the same conduct. *Id.* at 175-76. This Court held that because he had already been convicted and punished by a military tribunal for exactly the same act of DUI, RCW 10.43.040 prohibited a second prosecution for the same act. *Id.*

[2] Although not many, there are several other Washington cases that involve this same type of analysis (two convictions whose basis facts may or may not be identical). *See* State v. Rudy, 105 Wn.2d 921, 928-29, 719 P.2d 550 (1986) (holding that neither the defendant's state convictions of burglary nor kidnapping were in fact identical or included with the federal Hobbs Act offense); In Re Cook, 114 Wn.2d 802, 816, 792 P.2d 506 (1990) (holding that the defendant's state convictions of first degree assault and aiding a prisoner to escape were not in fact identical to his federal convictions of bank robbery and conspiracy).

Second, RCW 10.43.040 also applies when the acts that the Washington charge is based upon are within an offense for which the defendant has already been prosecuted. For example, in Caliguri, the defendant was convicted of federal racketeering and then later the State convicted the defendant of conspiracy to commit arson and conspiracy to commit murder. 99 Wn.2d at 514. This Court stated that the defendant's acts that formed the basis of his State conviction for conspiracy to commit arson had already been proven as one of the crimes that formed the basis of his federal racketeering charge. *Id.* As a result, this Court ruled that RCW 10.43.040 required that the defendant's charge of conspiracy to commit arson must be vacated. *Id.* On the other hand, the Court held that the defendant's charge of conspiracy to commit murder had not been a part of his federal racketeering charge and required a different mental state to be proven. *Id.* As a result, RCW 10.43.040 did not apply and his conviction remained. *Id.*[3]

[3] The State is unaware of any other Washington cases which address this particular application of RCW 10.43.040 (when the State conviction is included within the conviction of another jurisdiction).

B. RCW 10.43.040 AND DUI

Unfortunately, Washington case law contains very little authority for interpreting RCW 10.43.040 within a DUI context.[4] Therefore, application of RCW 10.43.040 to the factual scenario of DUI in this case is one of first impression in Washington.

1. Case Law From Other Jurisdictions

Fortunately, however, there are three sister states, Kansas, Kentucky, and California with substantially similar statutes that have addressed this issue of whether statutory double jeopardy applies when an impaired driver continuously drives from one state into another. In all of these jurisdictions, the reviewing court has concluded that this conduct constitutes two separate acts.

First, in State v. Russell, 229 Kan. 124 (1981), the defendant drove, during one continuous episode, both in Missouri and Kansas while under the influence of alcohol. *Id.* at 124-25. He was charged with DUI in both states. *Id.* at 125. Defendant pled guilty to DUI in Missouri. *Id.* at 128. The question before the Kansas Supreme Court was whether Kansas' double jeopardy statute barred Kansas from prosecuting the defendant for

[4] State v. Ivie, 136 Wn.2d 173 (1998) is the one Washington case interpreting RCW 10.43.040 when the underlying facts are DUI. However, this case pre-dates amendments to RCW 10.43.040 and this Court's analysis is not analogous to the case at hand because Ivie involved two prosecutions for exactly the same driving where the question presented in this case is whether an impaired driver who crosses jurisdictions subjects himself to prosecution by both states for his conduct performed within each state.

DUI in light of his DUI conviction in Missouri. Kansas' double jeopardy statute is substantially the same as Washington's and reads as follows:

> "(3) A prosecution is barred if the defendant was formerly prosecuted in a district court of the United States or in a court of general jurisdiction of a sister state or in the municipal court of any city of this state for a crime which is within the concurrent jurisdiction of this state, if such former prosecution:
> "(a) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummated when the former trial began;"

Kansas Statutes Annotated (K.S.A.) 1979 Supp. 21-3108(3). The Kansas Supreme Court reasoned that in order for this statute to apply, both the Kansas court and the Missouri court must have concurrent jurisdiction. *Id.* at 130. In order for that scenario to occur, "[t]he same conduct must give rise to both prosecutions with no additional fact being necessary to prove the prosecution -- there must be a substantial identity of the crimes." *Id.* The Court went on to give examples of crimes where Kansas' statute would apply, such as "kidnapping and conspiracy, parts of which by their very nature can occur in different locations." *Id.* For example, when discussing kidnapping, the Court added: "The fact part of a single kidnapping occurs in Kansas and part occurs in Missouri would not be considered two kidnappings in applying the statute." *Id.*

The Court then discussed the crime of DUI and stated that it "is a rather unique crime" because the prohibited "conduct is the doing of a particular act while in a particular condition -- yet, neither the act nor the condition, alone, is illegal." *Id.* at 131. The Court then stated that to prove DUI the State need not prove when and where the defendant consumed alcohol, but rather that when the defendant acted (the driving), he was in a certain condition (intoxicated) at a particular time and place. *Id.* As a result, the Court reasoned that whether the "defendant may have committed a similar crime in Missouri is wholly immaterial to the Kansas case." *Id.* This is because each state must prove that the defendant drove impaired while within the territorial boundaries of each state. *Id.* Therefore, "[t]he fact that a similar crime occurred in Missouri in close proximity time wise does not alter the prosecutor's burden of proof" when proving a DUI in Kansas. *Id.*

Second, in Commonwealth v. Stephenson, Ky., 82 S.W.3d 876 (2002),[5] the defendant, while under the influence of alcohol, drove from Kentucky into Indiana. *Id.* at 878. The defendant was stopped by a combination of Kentucky and Indiana law enforcement. *Id.* Both states charged the defendant with DUI. *Id.* at 879. Defendant pled guilty to DUI

[5] The Defendant argues that this case is not useful for this Court's consideration because the Kentucky statute uses different language than RCW 10.43.040. Petitioner's Brief 15. The Defendant, however, fails to articulate why these differences in the language of the two statutes changes the analogous nature of this case to the case before this Court.

in Indiana. *Id.* The question before the Kentucky Supreme Court was whether his Indiana conviction barred his Kentucky charge under Kentucky's double jeopardy statue. Kentucky's double jeopardy statute is substantially the same as Washington's and reads as follows:

> "When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state, a prosecution in such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal, a conviction which has not subsequently been set aside, or a determination that there was insufficient evidence to warrant a conviction, and the subsequent prosecution is for an offense involving the same conduct unless:
>
> (a) Each prosecution requires proof of a fact not required in the other prosecution; or
>
> (b) The offense involved in the subsequent prosecution was not consummated when the former prosecution began; or
>
> (2) The former prosecution was terminated in a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution."

KRS § 505.050. The Kentucky Supreme Court refused to apply Kentucky's double jeopardy statute to DUI. *Id.* at 883-84. The Court reasoned that both Indiana and Kentucky have established that it is a crime to drive drunk while within the territorial boundaries of each state. *Id.* at 883. As a result, "the fact that [the defendant] committed *the same or a*

similar criminal offense in both states during one trip behind the wheel is inconsequential -- Indiana did not seek to punish [the defendant] for his criminal conduct within the territorial jurisdiction of Kentucky and Kentucky does not seek to punish [the defendant] for his criminal conduct within the territorial jurisdiction of Indiana." *Id.* Therefore, because the act of drunk driving within Indiana was not the same act as driving drunk within Kentucky, the Kentucky Supreme Court held that Kentucky's double jeopardy statute did not bar Kentucky from prosecuting the defendant for DUI. *Id.* at 884.

Finally, in People v. Bellacosa, 147 Cal. App. 4th 868 (2007), the statutory double jeopardy issue was based upon the following facts:

> "In El Dorado County, California, a sheriff's deputy saw defendant's vehicle being driven with its lights off after dark. Defendant switched on the lights after the deputy turned his patrol car around and followed the vehicle. After observing defendant swerve back and forth between lanes and into the bike lane, the deputy activated the emergency lights and air horn of his patrol car. When defendant failed to stop, the deputy turned on his siren. Defendant increased his speed, made numerous lane changes, and illegally passed traffic at speeds up to 75 miles per hour. After running a red light, he drove across the border into Nevada, where officers of that state took up the pursuit. Driving at speeds up to 80 miles per hour, defendant eventually lost control of his vehicle, struck a guardrail, and was apprehended. Defendant, who had "physical symptoms consistent with intoxication," told Nevada authorities that he "wasn't going to stop for any cop who was just pulling him over for driving without headlights."

Id. at 872. The question before the California court of appeals was whether his Nevada convictions of DUI and evading a police officer barred the state of California from charging the defendant with DUI and eluding a peace officer under California's double jeopardy statue. *Id.* at 871. California's double jeopardy statutes are also substantially the same as Washington's. The Bellacosa court summarized them as follows:

> "Section 656 states: "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States, or of another state or territory of the United States based upon the act or omission in respect to which he or she is on trial, he or she has been acquitted or convicted, it is a sufficient defense."
>
> Section 793 states: "When an act charged as a public offense is within the jurisdiction of the United States, or of another state or territory of the United States, as well as of this state, a conviction or acquittal thereof in that other jurisdiction is a bar to the prosecution or indictment in this state."
>
> Parallel to section 656, Vehicle Code section 41400 states: "Whenever any person is charged with a violation of this code, it is a sufficient defense to such charge if it appears that in a criminal prosecution in another state or by the Federal Government, founded upon the act or omission in respect to which he is on trial, he has been convicted or acquitted."

Id. at 873-74. The court refused to apply its statutory double jeopardy protection to the case before it. *Id.* at 878. First, the court asserted that California case law established that "if the offense charged in another jurisdiction requires proof of physical acts different from the

physical acts that constitute the offense charged in California, then the California prosecution is not barred by section 656 even though some of the elements of the offenses overlap." *Id.* at 877. Second, in applying its case law to the case before it, the court stated the following:

> "Here, it is evident the physical acts defendant committed in California are not the same physical acts he committed in Nevada. In California, he drove while under the influence of alcohol and in a dangerous manner while evading a pursuing California peace officer. His California crimes were complete, and came to an end, when he entered Nevada. In Nevada, he drove while intoxicated and tried to elude pursuing Nevada peace officers. Those offenses did not begin until he left California, thus terminating his conduct in California. Defendant's actions in California would be neither necessary nor sufficient to prove his Nevada offenses. His actions in Nevada would be neither necessary nor sufficient to prove his California offenses."

Id. Further, the court acknowledged that the defendant's continuous course of conduct violated for the laws of California and Nevada, but also pointed out that "he did not violate the laws of both states simultaneously, and he did not do so by the same physical conduct." *Id.* As a result, the court of appeals ruled that California was free to prosecute the defendant for the crimes he committed in California.

The Defendant's actions in this case should be treated the same as the defendants' conduct in Kentucky, Kansas, and California. As in the aforementioned cases, the Defendant in this case performed dangerous driving in one state and continued to do so in another. When stopped by

law enforcement, the Defendant was not able to stand up without assistance and was unable to perform field sobriety tests. CP 46-48, 57. Further, he provided two breath samples with an alcohol content of .184 and .175. *Id.*

Following the reasoning from the above-named jurisdictions, the Defendant's continuous court of conduct violated both the laws of Oregon and Washington, but such conduct did not violate both states' laws simultaneously. As such, the evidence that was obtained in Oregon is not part of one overall criminal act that started in Washington and ended in Oregon, but is only relevant to show that when the Defendant was driving in Washington, he was impaired. As a result, because the Defendant's Oregon DUI conviction and the State of Washington's DUI charge arise out of separate acts, RCW 10.43.040 does not prohibit the State from prosecuting the Defendant.

2. State v. Mathers

The only Washington case that the State is aware of that presents a seemingly analogous factual scenario to the case at hand is State v. Mathers, 77 Wn. App 487, 891 P.2d 738 (1995).[6] In Mathers, the defendant, after assaulting a woman in Washington, took his victim's car and crossed The Dalles Bridge into Oregon where he was ultimately

[6] District Court Judge Swanger largely based him decision to dismiss upon his reading of Mathers. RP 21-23.

apprehended by Oregon police. *Id.* at 488. In addition to a litany of other convictions, the defendant was convicted of unauthorized use of a vehicle and theft in the first degree in Oregon. *Id.* at 491. In Washington, the defendant was also convicted of many crimes including taking a motor vehicle without permission and theft in the second degree. *Id.* The question before the court of appeals was whether RCW 10.43.040 barred the State from convicting the defendant of taking a motor vehicle without permission and theft in the second degree in light of his Oregon convictions. *Id.*

In ruling on the defendant's theft conviction, the court held that RCW 10.43.040 did not bar the State from convicting the defendant of second degree theft in Washington because the statutes contained different factual requirements (different acts) for each conviction. *Id.* at 493. The court reasoned that theft in the first degree in Oregon requires that a defendant "knowingly retained a firearm which he knew was the subject of a theft" whereas theft in the second degree in Washington "require[s] an intent to deprive." *Id.* Further, a person in Washington is guilty of theft in the second degree if the property taken exceeds $250 in value and the object of the theft need not be a firearm. *Id.* Because the two offenses were based on acts that were not identical, they were not "in fact" the

same. *Id.* Thus, RCW 10.43.040 did not bar the defendant's conviction. *Id.*

In ruling on the defendant's conviction for taking a motor vehicle without permission, the court held that RCW 10.43.040 did bar the defendant's conviction. *Id.* at 492. The court concluded that identical acts formed the basis of both convictions because both convictions were based upon the defendant's act of intentionally taking the victim's vehicle without her permission and driving it after holding her at gunpoint at her house. *Id.* Further, the court held that these acts would be required to satisfy the elements of both charges, *i.e.*, the defendant 1) intentionally 2) took a vehicle 3) without the owner's permission. *Id.* As a result, because the defendant's Oregon conviction for unauthorized use of a vehicle was partly based upon his conduct that occurred solely within the territorial boundaries of Washington, the court held that RCW 10.43.040 barred the State from convicting the defendant in Washington for those same acts. *Id.*

Whether or not this Court concludes that the Mathers decision was correct, RCW 10.43.040 does not prohibit prosecution in this case. Mathers can be viewed two ways. On one hand, one could conclude that Mathers was incorrectly decided because it confuses the distinction

between "act" and "evidence."[7] Under this interpretation, the defendant's acts of holding his victim at gunpoint and taking her car (acts that occurred while the defendant was in the state of Washington) are not inherently part of the defendant's Oregon conviction for unauthorized use of a vehicle. Instead, such acts should be viewed only as evidence that would be relevant to establish that when the defendant was driving the vehicle in Oregon, it was without the true vehicle owner's consent.

Applying this interpretation to the present case, all of the Defendant's acts that occurred in Oregon – such as his impaired driving, his physical signs of intoxication, and breath alcohol test – do not constitute part of one continuous act of DUI that started in Washington and ended Oregon. Instead, such acts should be viewed only as evidence that would be relevant to establish that when the Defendant was driving his vehicle in Washington, he was impaired.

On the other hand, one could conclude that Mathers was correctly decided. Under this interpretation, the defendant's acts of holding the victim at gunpoint and then driving away in her vehicle are the only acts

[7] The Defendant bases his argument on this confusion. He asserts that the evidence obtained in Oregon that shows that the Defendant was under the influence of alcohol is also the same facts that would be used to prove a conviction in Washington. Petitioner's Brief at 7-8. As a result, he argues that RCW 10.43.040 is triggered. However, under the State's theory of the case, the evidence obtained in Oregon is only relevant to show that while the Defendant was driving in Washington, he was impaired. Therefore, the same act is not prosecuted twice and RCW 10.43.040 does not apply.

that would satisfy the element of lack of consent as a part of the defendant's Oregon conviction for unauthorized use of a vehicle. As such, because the acts that occurred in Washington are part of one overall act and cannot be separated, RCW 10.43.040 would naturally prohibit Washington from prosecuting for the same act that formed the basis of his Oregon conviction.

Applying this interpretation of Mathers to the present case, the seemingly analogous nature between the two disintegrates. Mathers presents a factual scenario where the defendant's actions that occurred in Washington establish the element of the true owner's lack of consent as part of one overall crime that spanned two states. In this way, the crime of taking a motor vehicle without permission is one in which parts of one overall crime can occur in separate states resulting in both jurisdictions possessing concurrent jurisdiction.[8]

The crime of DUI, however, is what the State will term a "continuous action" crime where all of the elements of the crime are satisfied every second the act continues.[9] In a DUI context, when an impaired person drives a vehicle, all the elements of DUI are continually satisfied every second he or she drives. In this case, the Defendant's act of

[8] Other examples would include Murder (shooting in one state with the death in another), Conspiracy, Money Laundering, etc.
[9] Other examples would include Driving While Suspended, Attempt to Elude, Possession of a Controlled Substance, etc.

impaired driving while in Washington is a whole and complete crime. Unlike in Mathers, the Defendant's act of impaired driving while in Oregon is a separate act. Thus, the Defendant's actions in Oregon are only evidence that would be relevant to demonstrate that at the time of driving in Washington, he was impaired.

As illustrated above, notwithstanding what weight this Court chooses to give Mathers, RCW 10.43.040 only applies when the same act is prosecuted twice. Because the Defendant's conviction for DUI while within the territorial boundaries of the State of Oregon and the State of Washington's charge against him for DUI while within the territorial boundaries of State of Washington arise out of separate acts, RCW 10.43.040 does not prohibit the State from prosecuting the Defendant.

V. CONCLUSION

For each of the foregoing reasons, the State respectfully requests this Court to affirm the decision of the Superior court.

DATED this 20 day of November, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: _____
JOHN E. (JACK) PETERSON, WSBA#38362
Deputy Prosecuting Attorney